SINGAPORE REPORTS

Re City Securities Pte; Ho Mun-Tuke Don & Anor v Dresdner Bank & Ors

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 695 OF 1987
CHAO HICK TIN JC
27 APRIL 1990

Companies and Corporations — Security instruments — Letters of hypothecation — Daily certificates issued by stockbroking company — Whether security interest fixed or floating charge — Non-registration of charges under s 131 of Companies Act (Cap 50, 1988 Ed) — Effect of on liquidators if security interest is floating charge — Crystallization of floating charge — Taking of possession of share certificates — Companies Act (Cap 50, 1988 Ed), ss 131(1) & 137 — Companies Act 1948 [UK], s 95

Civil Procedure — Interim order — To seize charged assets — Effect of such order in winding-up

This originating summons was taken out by the liquidators of a stockbroking company, City Securities Pte (hereinafter called 'City'), to determine the legal nature and effect of certain security instruments created by City in favour of 18 banks who are the defendants herein. Prior to the presentation of the winding-up petition, City had at diverse dates obtained loans, advances or credit facilities from each of the 18 defendant banks. As security for the facilities obtained, City executed in favour of each of the first 17 defendants a letter of hypothecation whereby City charged to each bank all stocks and shares held by City in the course of its business, which were more particularly listed out in daily certificates. The instrument held by the eighteenth defendant was a 'facility letter' issued by that defendant, whereon City endorsed its acceptance. All the defendants, except the eighteenth defendant, commenced actions in the High Court and obtained (except the third defendant) ex parte interim orders against City requiring City to deliver up shares over which the banks claimed security rights under their security instruments and restraining City from disposing of or dealing with them pending delivery up. Pursuant to these interim orders the first, second, fourth, fifth, seventh and eighth defendants obtained delivery up of some or all of the share certificates they claimed to be entitled to. The third and eighteenth defendants managed to persuade City to place some shares in the joint custody of City and either of the two banks respectively. These six defendants, together with the third and eighteenth defendants, would be referred to as the 'scrip banks'.

Held, declaring that the letters of hypothecation were floating charges:

(1) The unascertainability of the shares charged and the liberty accorded to the company to substitute shares, which meant that the company had the right to trade in the shares, meant that the letters of hypothecation were floating charges. The arrangements as set out in the letters of hypothecation and the daily certificates show that there was no final and irrevocable appropriation of the shares listed in the daily certificates for the purposes of the charge thereby created.

(2) Neither the letters of hypothecation nor the daily certificates contemplated that the serial numbers of the share certificates charged would be spelt out. Without the serial numbers of the share certificates, the provision giving the bank the power to release by endorsement on the daily certificate is quite meaningless. The shares charged were not identified or identifiable.

(3) The system of daily certificates, upon which the entire case hinges, is quite inconsistent with the essential nature of a fixed charge. The daily certificates were to be issued at the will of City and were to contain such shares as City chose to set out. It plainly shows that the shares charged were ambulatory and shifting in nature. It also shows that City had the liberty to trade.

(4) The security instruments being a floating charge extending to all the stocks and shares of City, they should be registered in accordance with s 131(1) of the Companies Act (Cap 50, 1988 Ed) and as they are not so registered they are 'void against the liquidators and any creditor of the company'. The consequence of non-registration is to turn a secured creditor into an unsecured creditor.

(5) On the issue of whether what had been done by the scrip banks constituted crystallization, the court was of the view that since the floating charge is over all the stocks and shares of City, and not just confined to those listed out in the last daily certificate issued to each bank, the chargee must terminate City's licence to trade as to the whole of the company's assets which were affected by the charge in order to convert the floating charge into a fixed charge. In view of the fact that the daily certificates did not specify the precise share certificates that were hypothecated, the right to 'pounce down' on certain shares of City as elaborated in the letters of hypothecation has no scope to operate, as there is a problem of identification. Accordingly, there being a floating charge over all the stocks and shares, the scrip banks cannot pounce down on particular assets. The bank must crystallize the security as a whole and any lessor attempt would fail.

(6) The institution of an action and the granting by the court of an interim order for the delivery of the scrips listed in the last of the daily certificates issued per se does not bring about crystallization. The action instituted by each scrip bank was not intended to revoke City's right to carry on business but only to recover the scrips listed in the last certificate.

(7) The interim order obtained ex parte cannot alter the rights and liabilities of the parties. It only seeks to preserve the assets claimed by each bank without prejudice to the ultimate rights of the parties. This being the nature of such an interim order, whatever shares delivered by City to the bank in apparent compliance therewith must be held by the bank to await the outcome of the action pending between the parties. Such a delivery cannot bring about crystallization.

(8) In any case, on crystallization, no new charge is created. The floating charge ceases to float over a fund of assets and attaches in specie. The floating charge cannot be considered to have been spent as the share certificates were being held as security for the outstanding loan due from City to the banks. The securities so held by the banks would still be void against the liquidators.

[*Editorial Note*: The first, second, fifth and seventh defendants have appealed to the Court of Appeal vide Civil Appeal No 44 of 1990. The third and eighteenth defendants have appealed vide Civil Appeal No 48 of 1990. The eighth defendant has appealed vide Civil Appeal No 45 of 1990.]

Cases referred to

1 *Hilton* v *Tucker* (1888) 39 Ch D 669 (refd)
2 *Wrightson* v *McArthur & Hutchinsons (1919) Ltd* [1921] 2 KB 807 (refd)

3 *Harrold* v *Plenty* [1901] 2 Ch 314 (folld)
4 *Re Lin Securities (Pte)* [1988] 2 MLJ 137 (folld)
5 *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284 (refd)
6 *NV Slavenburg's Bank* v *Intercontinental Natural Resources Ltd* [1980] 1 All ER 955 (folld)
7 *Evans* v *Rival Granite Quarries Ltd* [1910] 2 KB 979 (refd)
8 *Mercantile Bank of India Ltd* v *Chartered Bank of India, Australia and China* [1937] 1 All ER 231 (distd)
9 *Siebe Gorman* v *Barclays Bank* [1979] 2 Lloyds Rep 142 (distd)
10 *Re Bond Worth* [1980] Ch 228 (folld)
11 *Hart* v *Barnes* [1983] 2 VR 517 (folld)
12 *Waters* v *Widdows* [1984] VR 503 (refd)
13 *Askrigg Pty Ltd* v *Student Guild of the Curtin University of Technology* [1990] 1 ACSR 40 (distd)
14 *Illingworth* v *Houldsworth* [1904] AC 355 (folld)
15 *Re Flinders Trading Co Pty Ltd* [1977-1978] ACLC 29738 (folld)
16 *Re Jackson & Bassford Ltd* [1906] 2 Ch 467 (refd)
17 *Esberger & Son Ltd* v *Capital & Counties Bank* [1913] 2 Ch 366 (refd)
18 *Re Yolland, Husson & Birkett Ltd* [1908] 1 Ch 152 (refd)
19 *Re Ehrmann Brothers Ltd* [1906] 2 Ch 697 (folld)
20 *R* v *Consolidated Churchill Copper Corp Ltd* [1978] 5 WWR 652 (refd)
21 *Re Brightlife Ltd* [1986] 3 All ER 673 (refd)
22 *Re Hubbard & Co* (1898) 68 LJ Ch 54 (folld)
23 *Re J & D Contracting Pty Ltd* [1971] QLR 101 (folld)
24 *Re Molton Finance* [1968] Ch 325 (folld)
25 *Re Toomer, ex p Blaiberg* (1883) 23 Ch D 254 (refd)
26 *Re Row Dal Constructions Pty Ltd* [1966] VR 249 (folld)

Legislation referred to
Companies Act (Cap 50, 1988 Ed) ss 131(1), 137
Companies Act 1900 [UK] s 14
Companies Act 1948 [UK] s 95

Richard Yorke QC (*CR Rajah* and *Elizabeth Choo (Ms)* with him) for the plaintiffs.

Peter Cresswell QC (*Davinder Singh* and *Indranee Rajah (Ms)* with him) for the first and second defendants.

Michael Miller QC (*David Hew* and *Yap Shao Sin* with him) for the third and eighteenth defendants.

Gavin Lightman QC (*Chan Cher Boon* and *Aqbal Singh* with him) for the fourth defendants.

Davinder Singh (*Indranee Rajah (Ms)* with him) for the fifth and seventh defendants.

Sarjit Singh Gill (*S Dilhan* with him) for the sixth, ninth and tenth defendants.

Peter Cresswell QC (*Randhir Ram Chandra* with him) for the eighth defendant.

Woo Bih Li (*Anthony Lee* and *Chew Seok Yam (Ms)* with him) for the twelfth, thirteenth, fifteenth and sixteenth defendants.

Sarbjit Singh (*Liew Tuck Yin* with him) for the fourteenth defendant.

Tok Boon Leong for the seventeenth defendant.

Cur Adv Vult

Chao Hick Tin JC: This originating summons was taken out by the plaintiffs, the liquidators of a stockbroking company, City Securities Pte (hereinafter called 'City'), to determine the legal nature of certain security instruments created by City in favour of 18 banks who are the defendants herein.

Pursuant to a creditor's petition filed on 3 July 1986, City was wound up by an order of court made on 31 October 1986. In the meantime, on 4 July 1986, provisional liquidators were appointed. Prior to the presentation of the winding-up petition, City had at diverse dates obtained loans, advances or credit facilities from each of the 18 defendant banks. As security for the facilities obtained, City executed in favour of each of the first 18 defendants a letter of hypothecation whereby City charged to each bank all stocks and shares held by City in the course of its business, which were more particularly listed out in daily certificates (in the case of the fourth defendant, periodic notices, and the eighteenth defendant, periodic certificates) furnished or to be furnished by City to each bank. The instrument held by the eighteenth defendant was just a 'facility letter' issued by that defendant, whereon City endorsed its acceptance. The letters of hypothecation and this facility letter shall hereinafter be collectively referred to as the 'security instruments'.

In mid-February 1986, each of the defendants made demand upon City under their respective security instruments and all, except the eighteenth defendant, subsequently commenced actions in the High Court and obtained (except the third defendant) on different dates ex parte interim orders against City requiring City to deliver up shares over which the banks claimed security rights under their security instruments and restraining City from disposing of or dealing with them pending delivery up. Pursuant to these interim orders the first, second, fourth, fifth, seventh and eighth defendants obtained delivery up of some or all of the share certificates they claimed to be entitled to. The third and the eighteenth defendants managed to persuade City to place some shares in the joint custody of City and either of the two banks respectively. I shall hereinafter refer to these six defendants, together with the third and eighteenth defendants, as the 'scrip banks'.

The present application is to seek the determination of the court on a number of legal questions relating to the security instruments and the daily certificates (or periodic notices or certificates) issued by City pursuant thereto. The central issue is to determine the nature and effect of these documents. What is the security interest thereby created, if any. And if the security interest thereby created is a floating charge, is it void against the liquidators and other creditors on the ground of non-registration under s 131 of the Companies Act (Cap 50, 1988 Ed). Further, is there crystallization of the floating charge by virtue of certain actions taken by the scrip banks, including the taking of possession of share certificates.

Relevant provisions of the letters of hypothecation

The provisions in each of the security instruments bear a large degree of similarity. In order not to overly burden

this judgment, I propose only to set out the relevant provisions of the letter of hypothecation issued by City in favour of Dresdner Bank (first defendant). As regards the other banks, I think it should suffice (except the fourth defendant) if I merely set out the charging provisions in each of the security instruments. The letter of hypothecation issued to Dresdner Bank is in these terms:

> In consideration of you at our request making or continuing to make advances ... we City Securities (Pte) ... hereby agree and undertake to repay ... all and every such sum or sums of money as is or are now or as shall from time to time hereafter be due or become due or owing or remaining unpaid by us to you ... and as a continuing security therefore we hereby agree that we shall hold on your account and under lien to and in trust for you all stocks shares bonds and other securities ... more particularly described in the daily certificate or certificates furnished or to be furnished by us to you which said securities are acquired by us in the normal course of business whether such said securities are registered in our name or in the names of our nominees or otherwise and whether such said securities are under our control possession or otherwise.

The letter of hypothecation also goes on to provide that:

> The said securities ... are and shall be free from all charges liens ... and that we are entitled in all respects to deal with the same ...
>
> We shall hold the said securities ... under lien to and in trust for you until the same are or any of them is released by you by endorsement on the said daily certificate or certificates ... and that until the same are or any of them is released by you we will transfer pay and deal with the said securities ... in such manner as you may direct ...
>
> We shall on demand deliver to you the said securities and at our cost and expense sign execute and deliver to you or to your nominees any transfer deeds or documents which you may require us to sign ...
>
> Your right to sell assign ... the said securities ... shall be immediately exercisable without further notice to us upon any default by us to pay or discharge within 24 hours after demand any moneys or liabilities ... hereby secured.
>
> At all times during the continuance of these presents, the amount due or owing from us to you shall not exceed 80% of the total market value ... of the securities ... and we shall keep up the said margin of 80% ...
>
> You may at all reasonable hours of the day inspect the said securities and the contract notes ...
>
> You shall not be liable for any loss ... howsoever caused nor shall you be answerable for any involuntary loss happening in or about the exercise of your powers hereby conferred.
>
> We shall not create any charge over or encumber any of the said securities ...
>
> Your rights under this security are cumulative, may be exercised as often as you consider appropriate and are in addition to your rights under the general law and your rights ... shall not be capable of being waived or varied otherwise than by an express waiver or variation in writing ...

The charging provisions of the other security instruments are in these terms:

Second defendant:

> ... And as a continuing security we hereby agree that you shall have a charge upon all shares bonds and securities ... more particularly described in a certificate to be furnished daily by us to you ... and also a pledge on the securities now or hereafter deposited with you.

Third defendant:

> ... we shall pledge to you all the shares bonds and documents more particularly described in the daily certificate which we herewith undertake to furnish you as a continuing security for the payment ...

Fourth defendant:

> ... we hereby charge, transfer and assign to the bank all our rights, title and interest in and to the security shares and the additional security ...

'Security shares' is defined to mean all shares quoted on the Stock Exchanges of Singapore and Kuala Lumpur described in any notice given to the bank in accordance with para 3.3 which shares have not been released by the bank pursuant to para 9.

'Additional security' refers to, inter alia, all securities which may 'at any time be derived from, accrue on or be offered in respect of the security shares, whether by way of redemption, exchange ...'

Paragraph 3.3 provides that City:

> will deliver to the bank on the date of each drawing (City) make under the facility a notice substantially in the form of exh 1 hereto specifying the security share ... and will deliver like notice in respect of all further security shares ... pursuant to para 6.1(a) ...

Fifth defendant:

> ... we hereby agree that you shall have a pledge upon all shares bonds and securities ... more particularly described in a certificate to be furnished daily by us to you ...

Sixth, seventh, tenth and fourteenth defendants: similar to the second defendant's. Eighth, ninth, eleventh, twelfth, thirteenth, fifteenth and seventeenth defendants: similar to the fifth defendant's. Sixteenth defendant:

> ... we shall hold as security on your account and under charge to and in trust for you all stocks shares bonds and other securities ... more particularly described in the daily certificate or certificates furnished or to be furnished by us ...

Eighteenth defendant:

> ... bank shall have a pledge, by way of a letter of undertaking, over the stocks and shares that are bought on behalf of (City's) clients, which (City) has a lien; hence (City) shall furnish a monthly list of all the pledged stocks and shares of at least US$1.2m in value term.

As can be seen, there are differences in wording of the various charging provisions. But viewed in the context of the letters of hypothecation as a whole, the differences are really quite marginal. I am inclined to think that in substance the parties had by the instruments intended to create a charge. While many of the letters of hypothecation refer to a pledge, it is well established law that for

a pledge to arise there must be delivery of the articles or goods in question: see *Hilton* v *Tucker*[1] and *Wrightson* v *McArthur & Hutchinson.*[2] In any case, on the authority of *Harrold* v *Plenty*,[3] I doubt shares may be pledged; if share certificates are deposited as security, it amounts to an equitable mortgage. Bearer bonds may be different. I am aware that in the view of some authors, eg Sheldon and Fidler's *Practice and Law of Banking* (11th Ed) and *Sykes on the Law of Securities* (4th Ed) an equitable mortgage of stocks and shares may be created when the mortgagor enters into a binding agreement to execute a proper form of transfer in favour of the banker. While I tend to agree with this point of view, I do not think it really matters as that is not what is provided in the letter of hypothecation that is not the true object of the letter of hypothecation.

As would be apparent, the essential features of the letters of hypothecation issued by City are substantially similar to those issued by Lin Securities Pte which I had the occasion to consider in the case *Re Lin Securities (Pte).*[4] Many of the arguments canvassed in the present proceeding were also canvassed in *Re Lin Securities.*[4] In effect, the present hearing gives me an opportunity to review the decision I made in that earlier case.

Relevant facts

At the outset, I should state that the defendants have not taken a unified stand on the issues which I have been asked to decide. The three Silks who act for six of the scrip banks have argued that the security instruments created a fixed charge rather than a floating charge. Counsel for the fifth and seventh defendants associated themselves with the arguments of the Silks. Mr Sarjit Singh (for the sixth, ninth, tenth and eleventh defendants) and Mr Woo Bih Li (for the twelfth, thirteenth, fifteenth and sixteenth defendants) took a stand on the side of the liquidators and argued that the instruments created only a floating charge. Counsel for the fourteenth and seventh defendants also stood on the side of the liquidators.

Before I proceed to deal with the legal arguments, I should first set out some of the pertinent facts and allegations relating to the positions of the first, second, third, fourth, eighth and eighteen defendants. This is necessary to better appreciate the arguments advanced by the parties.

First defendant. In an affidavit filed on behalf of the first defendant, it is stated that in line with 'the general market practice in Singapore at the time vis-a-vis lending to stockbrokers', the first defendant agreed to lend against a letter of hypothecation. It says that this device was resorted to to avoid having to shift share certificates to and from stockbroking offices. This merely removed the need to make physical delivery but in no way relieved the stockbroker to maintain proper internal records to ensure that at any given time, the first defendant would be able to ascertain the shares hypothecated to it. The first defendant admits that City 'had to provide a daily certificate to Dresdner detailing the charged shares at the end of each day' and that 'until a new daily certificate was received, these shares would remain charged to the bank.' On the question of ascertainment and identification, the first defendant says that it was understood that City would keep proper records to ensure proper identification.

Pursuant to the action taken by the first defendant and in compliance with an interim order obtained by the first defendant on 18 February 1986, City delivered to the first defendant the share certificates listed in the daily certificate of 17 February 1986, with the exception of two counters listed therein which the first defendant had indicated it would not accept.

Second defendant. In an affidavit filed on behalf of the second defendant a similar explanation on why actual delivery of the share certificates had not been demanded was given. This defendant had on 28 February 1986 commenced action and obtained an interim order requiring City to make delivery of the share certificates, which City did.

Third defendant. In its affidavit, the third defendant says that under its facility letter, City was obliged to hold the shares set aside for the third defendant in a separate fire-proof cabinet. It also says that its officers had from time to time called at the premises of City to inspect the shares referred to in the latest daily certificate. During such inspections, officers of City had represented to the third defendant's officers that the share certificates produced were the certificates held by City for the third defendant. Such share certificates were also kept in a separate cabinet with the third defendant's name marked against it. However, on 19 February 1986, when an officer of the third defendant sought to inspect the shares listed in the daily certificate of 17 February 1986 (the last certificate then issued) he was refused inspection and he was told by City's officers that the share certificates had ceased to be kept in separate compartments so as to identify them as shares held for the third defendant. On 21 February 1986 legal proceedings were commenced by the third defendant but before it moved for an interim order, City agreed and did place certain share certificates in three safe deposit boxes. The safe deposit boxes were opened in the joint names of the third defendant and City ('the licensees') and the boxes could only be opened jointly by both licensees. It also agreed between the parties that while City was indebted to the third defendant, City would not be free to withdraw the deposited shares.

Fourth defendant. As indicated above, one feature of the letter of hypothecation issued to the fourth defendant which is different from the rest is that it does not provide

for daily certificates. The fourth defendant says in its affidavit that pursuant to powers conferred in the letter of hypothecation, it gave 'a general (but revocable) consent to City to the release of the securities from the charge on condition that there was at all times maintained, where necessary ... by the substitution of further shares as security, sufficient security so that the facility did not exceed 70% of the value of the security.' Three spot checks verifying the daily certificates were made by officers of the fourth defendant. On 23 January 1986 at a meeting with the directors of City, the fourth defendant insisted on stricter control over shares charged to the fourth defendant. Under this arrangement all the shares so charged would be placed in a metal trunk which would be left at the premises of City. But the keys to the trunk would be held solely by the fourth defendant. Each evening the fourth defendant's representative would check that the share certificates (together with the duly completed blank transfers) were in accordance with the list furnished by City. The representative would then lock the trunk and bring the list and key back to the bank. The fourth defendant would then check that the securities listed were of the character and of the value required under the letter of hypothecation. Only when so satisfied would the bank's representative open the trunk the next day. The last daily certificate issued by City to the fourth defendant was dated 17 February 1986. On the evening of 18 February 1986 when the trunk was locked up, it contained the share certificates as listed in the daily certificate dated 17 February 1986. The last occasion when a representative of the bank opened the trunk was on the morning of 19 February 1986. However, on the evening of 19 February 1986, the representative was refused access to check the contents and lock the trunk. On 21 February 1986, the fourth defendant commenced proceedings and on the same day obtained an interim order for delivery up. On 24 February 1986, City delivered up some share certificates in compliance with that order.

Eighth defendant. The eighth defendant alleges that it recovered a large proportion of the share certificates listed out in the daily certificate of 21 February 1986 pursuant to an order of court of 24 February 1986. It also says that the transaction it entered into with City was most commonly entered into between banks and their stockbroking clients.

Eighteenth defendant. No letter of hypothecation was executed in favour of the eighteenth defendant. Instead what happened was that the letter of facility written by the bank was endorsed and agreed to by City. The relevant provision in the letter of facility has already been quoted above. The letter of facility referred to a letter of undertaking which, however, was never issued by City. This omission does not appear to be very material. The eighteenth defendant relies on the periodic certificates issued by City pursuant to the letter of facility as creating a fixed charge in its favour over those shares listed therein. On 24 February 1986, after hearing from the grapevine that other bank creditors of City were pressing City for payment, an agreement was reached between the eighteenth defendant and City whereby the share certificates charged to the eighteenth defendant would be placed in safe deposit boxes under the joint control of the eighteenth defendant and City. Pursuant thereto, City and the eighteenth defendant opened two safe deposit boxes with Tat Lee Bank. The eighteenth defendant paid the hire charges for the safe deposit boxes and deposited therein the share certificates listed out in a second certificate dated 21 February 1986. I should at this point state that two certificates were issued by City both dated 21 February 1986. The reason why a second certificate dated the same day was issued by City was because City was unable to produce all the shares listed out in the first certificate of that date. It was also part of the agreement that access to the two safe deposit boxes could only be obtained by City and the eighteenth defendant jointly.

Finally there is one other matter which I should refer to. It concerns all the banks. This is the Interbank Heads of Agreement dated 31 March 1986. Under this agreement, all the banks agreed among themselves that during the period 25 February 1986 to 4 May 1986 (called 'the standstill period'), no further proceedings, except those listed therein, would be taken by any of the banks against City pursuant to their rights under their respective security instruments. During the standstill period each of the banks undertook, inter alia, not to sell or dispose of any scrips held by it in respect of its security instruments save with the unanimous consent of the other banks. This standstill period was subsequently extended by mutual agreement and eventually expired on 2 July 1986. In the meantime, it would seem that City continued to trade. Subsequent to the winding-up of City, the shares delivered by City to and held by the scrip banks were sold by the liquidators pursuant to two orders of court and which sales were to be without prejudice to the rights of the parties.

Main arguments of the parties

I will now proceed to set out the main arguments of the parties. For the purposes of the present application the liquidators are prepared to concede that a charge was created in favour of all the defendants by virtue of the security instruments. Mr Yorke, however, made an express reservation that should this matter go any further, he reserved the right to query whether the security instruments in favour of the third, fifth, eighth, ninth, eleventh, twelfth, thirteenth, fifteenth, seventeenth and eighteenth defendants are effective to create a security interest as the instruments purport on their face to create solely a pledge

and there being no delivery of assets sufficient to constitute a pledge. Mr Yorke submitted that the charges created by the letters of hypothecation have all the characteristics of a floating charge enunciated by Romer LJ in *Re Yorkshire Woolcombers Association Ltd*[5] at p 295, viz:

(i) a charge on a class of assets of a company present and future;
(ii) that class is one which, in the ordinary course of business of the company, would be changing from time to time; and
(iii) by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets.

He contended that none of the security instruments fulfilled the cardinal requirement of a fixed charge, ie that the subject property be identified or identifiable. None of the documents identified the shares by their certificate numbers. The shares were treated as fungibles. While the provisions in the letter of hypothecation were specific, the property they sought to charge was not specifically ascertained or ascertainable. Accordingly, no fixed charge was created. He argued that the system of daily certificates was clear evidence that City was allowed to trade. It also showed that the parties recognized that in the stockbroking business there would be this constant turnover.

Mr Yorke's next point is that as the letters of hypothecation created a floating charge it must be registered under s 131 of the Companies Act (Cap 50, 1988 Ed) and as none of the letters of hypothecation are so registered, they are void against the liquidators and any creditor of the company. He said there was no crystallization of the floating charge by virtue of the demand for delivery, institution of court proceedings, obtaining of interim order for delivery up or actual delivery up pursuant to the interim order. For there to be crystallization, the action must relate to all the assets subject to the charge, ie all the stocks and shares of City. Even if there was crystallization prior to liquidation, Mr Yorke submitted that the resulting fixed charge remains a security conferred by the original floating charge and such a security remains void against the liquidators and creditors of City. He relied on *NV Slavenburg's Bank* v *Intercontinental Natural Resources Ltd.*[6]

Mr Cresswell for the first, second and eighth defendants submitted that the letter of hypothecation created a fixed charge and/or an equitable mortgage over the shares described in the current daily certificates. Among the reasons he advanced that a fixed charge was created are these:

(i) applying *Re Yorkshire Woolcombers Association,*[5] the letter of hypothecation did not create a charge over a class of assets but over specified securities listed in the daily certificates;
(ii) the purpose of the daily certificates was to identify those specific securities;
(iii) it is irrelevant that the shares comprised in the daily certificates changed from time to time;
(iv) City was obliged to deliver up the securities to the defendants on demand;
(v) numerous other restrictions were placed on City in dealing with the shares, eg not to create any charge over the shares in favour of another person; and the defendants had the right to inspect the shares.

He emphasized that the character of a transaction must be determined at the date of its creation. He said that it is wrong to rely on subsequent conduct to determine the legal character of the letter of hypothecation even if the conduct was contrary to the provisions of the letter of hypothecation.

Mr Cresswell submitted that *Re Lin Securities (Pte)*[4] could be distinguished or, if not, it was wrongly decided. He said that in that case the court had failed to give proper consideration to the scheme of things of the daily certificates. His primary contention is that the letter of hypothecation itself constituted a fixed charge; in any event it should be construed to have created a fixed charge if read together with the daily certificates, ie the fixed charge was on the particular assets of City described from time to time in the daily certificates.

In the alternative, Mr Cresswell submitted that if on its true construction the letter of hypothecation only created a floating charge, then on demand being made for delivery up and/or the commencement of legal proceedings and/or the grant of interim court order for delivery up and/or the delivery up itself, that converted the floating charge into a fixed charge and it followed that the question of the non-registration of the letter of hypothecation was quite irrelevant. In any event, he submitted that the delivery up by City of the share certificates to the scrip banks constituted a pledge.

Mr Miller associated himself with the arguments of Mr Cresswell on the nature of the letter of hypothecation. And here I would just add that the third defendant has in its affidavit said that it 'does not seek to rely on the letter of hypothecation as creating any fixed or floating charge, because none were identified in it and no immediate charge was created'. However, in contending before me that the letter of hypothecation and the facility letter created fixed charges, reliance was placed by Mr Miller on the fact that the letter of hypothecation did give the bank an express right to 'pounce down' on the particular assets comprised in the daily certificates, to take those assets and to keep them as its security. In support, the following opinion of Fletcher Moulton LJ in *Evans* v *Rival Quaries Ltd*[7] at p 998 was quoted:

It is inconsistent with the nature of a floating security that the holder should be able to pounce down on particular assets and to interfere with the company's business while still keeping his security a floating security.

He said under the letter of hypothecation if the bank should exercise its right to call for delivery or transfer of scrips, City nevertheless remained free to conduct its business. Accordingly, Mr Miller submitted that the true nature of the transaction was thus a specific mortgage of the assets, plus a licence to dispose of them in the course of City's business. It was not a floating charge.

Mr Miller also put forward a separate line of argument which is slightly different from that of Mr Cresswell. He said the document that created the fixed charge is the daily certificate. But reference could be made to the letter of hypothecation and facility letter to show the terms under which each daily certificate was governed. He contended that the essence of the transaction between the third and eighteenth defendants and City was that City should give the defendants 'by way of security for sums then advanced a fixed charge on specific assets to be identified by the certificates which City undertook to furnish.' So even if the court should hold that the letter of hypothecation and the facility letter created floating charges and assuming that they are void for non-registration pursuant to s 131, Mr Miller submitted that that section could have no effect on the daily certificates which City was contractually bound to issue and under which the two defendants acquired equitable charge over the specific assets listed out in each certificate.

In the further alternative, even if the letter of hypothecation and the facility letter and the daily certificates created a floating charge, he submitted that the joint deposit arrangements clearly created a specific security as the arrangements did not give City any legal right or de facto opportunity to deal with the deposited securities as its own. A floating charge would not be affected by s 131 if it has crystallized before liquidation and before any claim was made by any creditor.

In the case of the fourth defendant, Mr Lightman submitted that the fourth defendant was granted a fixed charge on one of these three bases: (i) the letter of hypothecation read with the daily certificate of 17 February 1986; (ii) the agreement of 23 January 1986 reached between City and the fourth defendant and; (iii) by the actual delivery on 24 February 1986 of the securities by City to the fourth defendant. In the alternative, he said that if the letter of hypothecation created a floating charge, such a charge crystallized on 23 January 1986 when the arrangement was entered into or when proceedings were commenced by that defendant against City. In the further alternative, the fourth defendant contended that following City's delivery of the share certificates to the fourth defendant in compliance with the order of court, there was in effect a lien or a pledge of the same.

Mr Lightman submitted that under the letter of hypothecation there is clearly a charge of specific shares as set out in the daily certificates. He said that a charge is a fixed charge if the consent of the chargee is required before any dealings may be carried out on the charged assets. This is so even if the chargee subsequently gives a general revocable consent, or if the consent is conditional upon substituted assets being provided before the charger is given any licence to deal with any charged assets.

Submitting on behalf of the sixth, ninth, tenth and eleventh defendants, Mr Sarjit Singh said that it was clearly the intention of City to secure all its bankers similarly, notwithstanding some slight differences in the wording of the respective letters of hypothecation. He argued that the letters of hypothecation could not have created a fixed charge for these reasons:

(i) The daily certificate did not identify the precise share certificates that were charged by setting out the serial numbers.

(ii) City was allowed to trade in the shares listed in the daily certificates.

(iii) There was evidence of multiple hypothecation as the final count showed that there was a shortfall in the quantum of share certificates held and those hypothecated in all the daily certificates.

On the question of crystallization, Mr Sarjit Singh submitted that that took place on 18 February 1986 when City ceased to trade. Alternatively, it took place on 20 February 1986 when City wrote to the banks that it was pooling all its shares as security for all its bankers, or on 25 February 1986 when Peat Marwick Mitchell & Co took over management of the scrips from City and City ceased to trade, or when the banks obtained orders of court for delivery up. He said that if this court should hold that the interim orders of court did bring about crystallization then the delivery up of the share certificates by City to the banks in question did not confer any rights to the scrip banks. He contended that the orders of court are in the nature of a preservation order. They did not determine the rights and liabilities of the parties. The scrip banks have yet to prove that they are entitled to those share certificates delivered up by City under compulsion of the orders of court. In any event he submitted that as the letter of hypothecation, being a floating charge, is void for non-registration, then all securities obtained thereunder, whether pursuant to an order of court or otherwise, are also void and cannot be valid against the liquidators.

As regards the arrangements whereby the shares hypothecated to the third and eighteenth defendants were separately kept in joint safe deposit boxes, Mr Sarjit Singh

contended that that did not constitute a pledge as the two banks did not have actual or constructive possession of the shares. Even under this arrangement, City was at liberty to carry on its business which it did.

As regards the fourth defendant, Mr Sarjit Singh submitted that if one were to go strictly on the basis of its letter of hypothecation, then the fourth defendant is totally unsecured. This is because under cl 3.3, a notice must be issued at the time of each drawing and the fourth defendant has not been able to produce any such notice. What were issued to the fourth defendant were the daily certificates, which are identical to those issued to the other banks.

Mr Woo submitted that the letter of hypothecation created a floating charge rather than a fixed charge for two reasons; (i) impossibility to ascertain the shares which were charged under each daily certificate and; (ii) City had the freedom to deal in the shares so charged. If in fact the letter of hypothecation did create a floating charge then by virtue of the non-registration of the charge, it is void. Like Mr Yorke, he submitted that the case *Mercantile Bank of India Ltd* v *Chartered Bank of India, Australia & China*[8] was wrongly decided as that case renders quite superfluous the provisions in the Companies Act for extension of time to register. He argued that if in fact the letter of hypothecation created a fixed charge then subsequent conduct converted the fixed charge into a floating charge. In the further alternative, he argued that estoppel applies.

As regards the contention of the third and eighteenth defendants that each daily certificate constituted a fixed charge, Mr Woo first observed that it must then follow that this court is entitled to take into account the subsequent conduct in which City did freely substitute the shares listed in each daily certificate. The court could also take that into account in determining if there was any variation of the terms of the agreement. And if each daily certificate were to stand on its own as a separate charge then there appears to be no consideration for it or at best it is a case of past consideration. Further, if the letter of hypothecation and/or the daily certificates constituted only a floating charge, then he said that the joint safe deposit box arrangement could not amount to crystallization and convert the floating charge into a fixed charge. In this connection he relied on *NV Slavenburg's Bank* v *Intercontinental Natural Resources Ltd*[6] as authority that a joint account could not constitute crystallization.

As regards the arrangement between City and the fourth defendant of keeping share certificates in the trunk, Mr Woo submitted that that did not materially affect the freedom of City to deal with the shares. He said that that arrangement was to assist the fourth defendant to check on the shares but not to deprive City of the freedom to deal or trade with the shares. And if the letter of hypothecation and periodic certificates constituted a floating charge, the trunk arrangement could not have brought about crystallization.

Consideration of the issues

(a) Fixed or floating charge?

The first issue which I have to decide is the nature of the security instruments issued by City to the defendants. While there are differences in wording in the seventeen letters of hypothecation, as well as the inclusion/exclusion of particular clauses in the letters of hypothecation, it seems to me that looking at each of them as a whole, the differences are really quite inconsequential. As for the facility letter of the eighteenth defendant, other than the provisions quoted above, no other provisions are specified in it relating to the alleged 'pledge'. For ease of consideration, I will only refer to the letter of hypothecation issued to the first defendant and when the provisions therein are compared with the provisions of the letter of hypothecation which I had to consider in *Re Lin Securities Pte*,[4] I see substantial similarities between the two, ie holding on your account or charging all the stocks and shares more particularly described in the daily certificates; the certificates were to be issued daily; the shares were acquired in the course of the company's business as stockbrokers; the shares in daily certificate were to be released by endorsement thereon; the daily certificates did not identify the precise share certificates which were charged by setting out the serial numbers of the same and only described the counter, quantity and value; power was given to the bank to inspect the shares; undertaking not to create any charge over the same shares. I am unable to see any material differences between the two letters of hypothecation.

As I have stated above, Mr Cresswell submitted that if it were not possible to distinguish the letters of hypothecation in the present case from that dealt with in *Re Lin Securities*,[4] then he would say that *Re Lin Securities*[4] was wrongly decided. I have indicated to counsel at the very outset of this hearing that I recognize that this case will inevitably involve a review of my decision in *Re Lin Securities*.[4] A number of cases not referred to in *Re Lin Securities*[4] have been cited by counsel to me. Let me state forthwith that I do not propose to deal with all the cases as I do not think that is necessary. I will only refer to a few of them which I think are more pertinent, as ultimately I have to decide this case in the light of the arrangements as embodied in the letter of hypothecation, taking into account the surrounding circumstances.

First is the case of *Siebe Gorman* v *Barclays Bank*.[9] I would add that I was aware of this case when I was considering *Re Lin Securities*.[4] But I did not think it assisted me there. In *Siebe Gorman*,[9] a company executed a debenture which, inter alia, charged to a bank with the

payment of all liabilities '(d) by way of first fixed charge all book debts and other debts now and from time to time due or owing to the company'. Another clause in the debenture (cl 5[c]) provided that:

> ... during the continuance of this security the company ... (c) shall pay into the company's account with the bank all moneys which it may receive in respect of the book debts and other debts thereby charged and shall not without the prior consent of the bank in writing purport to charge or assign the same in favour of any other person and shall if called upon to do so by the bank execute a legal assignment of such book debts and other debts to the bank.

The court was faced with the problem, inter alia, of determining the nature of the charge involving the book debts. Slade J in the first place held that it was perfectly possible in law for a mortgagor, by way of continuing security for future advances, to grant to a mortgagee a charge on future book debts in a form which created in equity a specific charge on the proceeds of such debts as soon as they were received. He held that the charge in question was such a fixed charge. He also went on to say that he saw 'no reason why the court should not give effect to the intention of the parties as stated in cl 3(d), that the charge should be a first fixed charge on book debts.'

One can see immediately the distinguishing features between the present case and *Siebe Gorman.*[9] First, there were no daily certificates in *Siebe Gorman.*[9] Second, in *Siebe Gorman*[9] there was no problem of identification of the assets charged. Thirdly, in *Siebe Gorman*[9] there was an express provision that provided that a first fixed charge was created; and as I have noted above, this was a point which Slade J took very much into account in arriving at his decision.

One of the cases cited to me here but which was not cited to me in *Re Lin Securities*[4] is *Re Bond Worth,*[10] again a decision of Slade J. There a company, which manufactured carpets, purchased man-made fibre from sellers and spun, dyed and wove the fibre into carpets. One of the terms of the sale, entitled 'retention of title clause', provided that:

> (a) ... equitable and beneficial ownership shall remain with [the sellers] until full payment has been received ... or until prior resale, in which case our beneficial entitlement shall attach to the proceeds of resale or to the claim for such proceeds.
>
> (b) Should the goods become constituents of or be converted into other products while subject to our equitable and beneficial ownership, we shall have the equitable and beneficial ownership in such other products as if they were solely and simply the goods ...

Subsequently, the company was placed under receivership. On a summons to determine the validity and priority of the sellers' claims, Slade J, after an extensive review of the authorities, held (at p 268):

> In the present case, in my judgment, the respective charges on each of the four categories of charged assets were ambulatory and shifting in their nature, and were intended to hover over them until the happening of an event which caused them to crystallize. The assets comprised in each of the four categories were of a fluctuating class ... Until a crystallizing event occurred, it was clearly not intended that any restriction should be placed on Bond Worth to deal with them in the ordinary course of its business.
>
> ... in my judgment the effect of the retention of title clause was to create floating charges over the four categories of charged assets ...

This case shows that the court would consider all the circumstances in determining the true character and effect of an instrument, notwithstanding particular clauses which may appear on the face of it to create a fixed charge.

In *Hart* v *Barnes,*[11] a decision of the Supreme Court of Victoria, a company by a debenture charged all its assets, property and undertaking, including its book debts, and that such charge would constitute as to the company's books debts a fixed and specific charge. The debenture then went on to provide that:

> ... the company hereby as beneficial owner conveys assigns and sets over the same unto the mortgagee absolutely subject only to the proviso for redemption hereinafter contained and with the intention that as to each and all future book debts ... the same shall be specifically charged and legal title to the same shall rest in the mortgagee upon the same coming into existence.

By a supplemental agreement entered into between the debenture holder and the company on the same day, the parties agreed that:

> ... provided that the amount owing shall not have become payable pursuant to the terms in this agreement, the mortgagor may collect the book debts as provided in the debenture and may employ the proceeds of such collections in its business as it sees fit.

In the light of these provisions, the learned judge, Anderson J, held that until such time as the debenture holder exercised its right to appoint a receiver, the identity of the book debts over which the charge operated would therefore be liable to change according to the payment of book debts and the transaction of the company's business. He also went on to hold that even without the provision in the supplemental agreement (at p 521):

> ... it could not sensibly be said that while the company was not in default under the debenture and was allowed under cl 2 of the debenture to carry on its business, the company could nevertheless not make use of funds received in payment for the goods which it sold. While the business of the company was a going concern, the aggregate of funds representative of the company's book debts would probably fluctuate between extremes. It is for this reason that, in my opinion, it was not open to the company to create the 'fixed and specific charge' in respect of the company's book debts, each book debt (or many of them) being an evanescent entity to which nothing could attach until the appointment of the receiver.

The assertion in the debenture charge that there was created a fixed and specific charge as to the company's book debts and that it was the intention that as to each and all future book debts they be specifically charged and that the legal title shall vest in the debenture holder upon the same coming into existence, cannot be given effect to, for that intention is repugnant to the nature of a charge over a future asset, the disposition of which is still at the will of the company. It cannot sensibly be said that in respect of each present and future book debt of the company the debenture holder obtains a legal title when the fact is that such 'title' is defeasible and capable of being destroyed by the company which is able to use the proceeds of such book debts in its business without in any way being accountable to the debenture holder for such proceeds. (Emphasis added.)

Next is the case *Waters* v *Widdows*[12] where a company granted to a bank a fixed charge over certain of its assets and a floating charge over its book debts. Subsequently, the company granted to a finance company a fixed charge over all its assets. Several issues were raised in the case but for our purposes here I propose only to refer to that part of the court's decision relating to the nature of the charge created in favour of the finance company. It would appear that the deed executed in favour of the finance company purported to create a fixed charge over all of the company's undertakings property and assets including goodwill chattels stock and book debts both present and future and also purported to operate as a conveyance and assignment of the same absolutely subject only to a right of redemption in the company. It also purported to vest legal title in the finance company in future assets upon the same coming into existence. And rather curiously it further purported to create a floating charge in favour of the finance company over all other of the undertakings and property and assets of the company not charged by way of a fixed charge. As regards book debts, the deed purported to operate as an assignment of the same and required the company to pay all moneys collected by it in respect of book debts into a separate trust bank account for the finance company to be nominated by the latter unless otherwise directed in writing by the latter. Nicholson J held that the arrangements as set out in the deed had all the three characteristics of a floating charge enumerated by Romer LJ in *Re Yorkshire Woolcombers Association.*[5] He went on to say that even if Romer LJ's third characteristic was not satisfied:

> I think that if the real nature of the present arrangement is examined, it was clearly the intention of the parties that the company could deal with its book debts and stock-in-trade pending an event which would give rise to the enforcement of this security.

Recently, while I was writing this judgment, my attention was drawn by Mr Davinder Singh to a recent case decided by the Supreme Court of New South Wales: *Askrigg Pty Ltd* v *Student Guild of the Curtin University of Technology.*[13] Accordingly, I directed the Registrar of the High Court to refer this case for the comments of all the parties in this proceeding.

In *Askrigg,*[13] a company which traded in bills of exchange, took deposits of money from the public to finance their trading. Following a deposit, the company sent a letter to the depositor setting out the date of deposit, whether secured, the amount, the term and the rate of interest. This letter also stated 'the following securities are pledged to secure your deposit. The securities are held by us on your behalf.' The securities in question were identified by the names of the drawer and acceptor and, where appropriate, of the endorser and the face value and date of maturity of the bills. The bills remained in the physical possession of the company, though they were placed in a security packet bearing the name of the relevant depositor, which security packet was held in a security box. The company had on occasions 'switched' the bills of exchange by dealing with them by sale or otherwise. However, a replacement would be made either before or immediately thereafter of the switch or the deposit would be repaid to the depositor. When such a 'switch' took place, a letter, in similar terms to the original letter, in which details of the new security were given, would be issued. The liquidator there contended that the arrangements constituted floating charges and as they were not registered the charges would be void as a security against the liquidator. However, the depositors (the defendants) submitted that the security which they had obtained fell within the exemption set out in s 200(2) of the Companies (NSW) Code which provided that the provisions as to registration would not apply to 'a charge created in relation to a negotiable instrument or a document of title to goods, being a charge by way of pledge, deposit, letter of hypothecation or trust receipt.' Cohen J held that on the facts, the essential elements of a floating charge had not been established. He felt that the facts supported the making of a pledge.

In my view *Askrigg*[13] is distinguishable from the present case on the following grounds:

(i) Quite clearly in *Askrigg*[13] there was no problem of identification of the bills of exchange which were charged. However, in the instant case, that problem is clearly present; neither the letter of hypothecation nor the daily certificates identified the share certificates that were charged.

(ii) In *Askrigg,*[13] the 'switching' was only done occasionally whereas in the present case (as in *Re Lin Securities*[4]) the switching was contemplated to take place and did in fact take place every business day with the issue of each daily certificate.

(iii) Further the 'switching' in *Askrigg*[13] was done by having one or several specific bills of exchange replacing another or several specific bills of exchange, unlike here where City could make unascertainable replacements in each daily certificate.

(iv) The main reason why the court in *Askrigg*[13] held that the charge was not a floating charge was because on the facts, and in particular the letter, the court could not find that there was a charge 'over a class of assets'. The letter in *Askrigg*[13] set out specific bill or bills of exchange. There was no other document evidencing the transaction. However, in our case here, the letter of hypothecation does refer to 'all stocks shares bonds and other securities ... more particularly described in the daily certificate.'

Accordingly, I do not think *Askrigg*[13] is really of much assistance to me. The only feature which may at a blush bear some resemblance to the present case is the 'switching'. But on closer scrutiny one sees that the 'switching' there and the dealing which City could carry on with the shares listed out in the daily certificate are vastly different. The 'switch' was the replacement almost immediate of a specific bill with another specific bill and that occurred only occasionally. On the other hand, in our case, the shares listed in the daily certificates clearly lack specificity. With respect, I think *Askrigg*[13] is probably right on its own fact-situation. Undoubtedly, the learned judge there was clearly more concerned whether the transaction fell within the exception provided in s 200(2) and there is no equivalent provision to that section in Singapore. He was plainly more concerned to determine whether the transaction amounte to a pledge and he dealt rather briefly with the question of a floating charge.

It is quite clear that none of the cases cited to me by the parties are as near to the facts of this case as *Re Lin Securities*.[4] The charging provision in *Re Lin Securities*[4] is in pari materia with the letters of hypothecation in the present case. The schemes of things are really identical. Only one fact is different: in *Re Lin Securities*[4] all the banks in that case registered their letters of hypothecation under the Companies Act which is not the position here.

I have carefully reviewed my decision in *Re Lin Securities*[4] and have not been persuaded that I should alter the conclusion I reached there. As I see it, the main grounds which made me decide the way I did in *Re Lin Securities*[4] apply equally here. The fact that in the present case the banks did not register the letter of hypothecation is hardly sufficient for me to differentiate the present case from *Re Lin Securities*.[4] In this regard, I would observe that none of the banks said that they had no knowledge of the charges (or letters of hypothecation) created by City in favour of the other banks when each bank entered into the arrangement. The first defendant in its affidavit says that it agreed to lend against a letter of hypothecation in line with the 'general market practice'. This says a lot. Indeed from several letters exchanged between the first defendant and City in late 1982 and early 1983, it is clear that the first defendant wanted to register its charge but was persuaded by City to refrain from doing so on the ground that the other bankers had 'indicated that as long as all our bankers rank pari-passu with one another' they would not insist on registration. City gave an undertaking to inform the first defendant of any change in City's arrangement with any of its bankers. From the affidavits filed by the eighth and ninth defendants, it was also clear that City did not try to keep the involvement of the other banks a secret. Indeed, the letter of facility of 28 February 1984 of the third defendant is just as telling. In it was stated that City would allow Tat Lee Bank (third defendant) to proceed with the registration should any of the other bankers 'impose a registration over their letter of hypothecation'. Unmistakably implied in that statement are two things — one, none of the banks would register their letter of hypothecation and two, an undertaking by City that there would be parity of treatment among the banks.

For the reasons which I gave in *Re Lin Securities*[4] regarding the unascertainability of the shares charged and the liberty accorded to the company to substitute shares, and which in effect meant that the company had the right to trade in the shares, I am of the view that it is quite inconsistent to consider the present letters of hypothecation as creating fixed charges. I accept the submission of Mr Lightman that there is no inconsistency between the existence of a fixed charge and the existence of a risk that the mortgagor may wrongfully destroy the subject-matter of the charge. But that is not the point here. The point is what is the real nature of each letter of hypothecation. The arrangements as set out in the letters of hypothecation and the daily certificates show that there was no final and irrevocable appropriation of the shares listed in each daily certificate for the purposes of the charge thereby created. Neither the letters of hypothecation nor the daily certificates contemplated that the serial numbers of the share certificates charged would be spelt out. Without the serial numbers of the share certificates, the provision giving the bank the power to release by endorsement on the daily certificate is quite meaningless. The shares charged were not identified or identifiable. One must bear in mind what Lord MacNaghten said in *Illingworth* v *Houldsworth*[14] at p 358: 'A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained or defined.' I do not intend to repeat the points canvassed in *Re Lin Securities*.[4] But I would emphasize this. The system of daily certificates, upon which the entire case hinges, is quite inconsistent with the essential nature of a fixed charge. The daily certificates were to be issued at the will of City and were to contain such shares as City chose to set out. It plainly shows that the shares charged were ambulatory and shifting in nature. It also shows that City had the liberty to trade. The fact that the shares listed must be up to the prescribed value does not alter that position.

As regards the liberty to trade in the shares charged, counsel have argued that each instance of substitution (on the issue of a new daily certificate) was made with the implied consent of the banks. In answer to that, I would just adopt the following comments of *Gough on Company Charges* (at p 129):

> It is inconsistent, however, to postulate the existence of a specific security over future property (still unascertained) with an implied consent or licence by the creditor given to the debtor to appropriate the property when ascertained to purposes other than that of the security and otherwise inconsistent with the existence of the security. Moreover, it can be seen that this is so even with regard to present property where there is an implied licence to appropriate the property in such a manner (eg by sale by the debtor to purchasers in the ordinary course of business). In such a case the security must be floating, since where such a licence exists the mere present ownership or subsequent acquisition of property by the debtor (which in other circumstances might be capable of being sufficient) can then no longer in fact be sufficient to constitute the final and irrevocable appropriation necessary to create a specific charge. Such a putative 'implied licence' or 'implied consent' security, whatever name the parties themselves might care to give to it, cannot be a specific security but is a floating security.

I have stated in *Re Lin Securities*[4] that the business of a stockbroking firm involves constant turnover. Mr Miller argued that buying and selling of shares on behalf of clients is only one aspect of the business of such a firm. He cited the following as transactions which may not necessitate constant turnover — stockbroker's own investment; safe custody of client's long term investments and financing of client against deposit of long term investments. But what better proof could there be that the parties contemplated constant turnover than the system of daily certificates itself.

Accordingly, on a true construction of the security instruments I hold that they created in each case a floating charge and the charge extends to all the stocks and shares of City, whether the same be in City's name or otherwise. That being the case, the security instruments should all be registered in accordance with s 131(1) of the Companies Act and as they are not so registered they are 'void against the liquidators and any creditor of the company'. The consequence of non-registration is to turn a secured creditor into an unsecured creditor: *Re Flinders Trading Co Pty Ltd*[15] at p 29747.

(b) Was there crystallization?

I now turn to the next issue: was there a crystallization of the floating charge following from the demands made by the scrip banks to City to deliver the shares listed in the last certificate issued to each scrip bank and/or the institution of action by each scrip bank against City and/or the grant by the court of the interim order requiring City to deliver the shares and/or the actual delivery of the shares by City in compliance with the order. The scrip banks say that as crystallization occurred prior to commencement of winding-up, the charges had become fixed charges and are no longer caught by s 131.

According to Gough, the grounds for crystallization all 'postulate the stoppage of the company as a going concern and the consequential cessation by the company of trading in the ordinary course'. He sets out (at pp 85-86) the following circumstances which would crystallize a floating charge:

(1) if the company goes into winding-up;
(2) if the company itself stops trading in fact without as yet being in winding-up;
(3) if the company disposes of the whole of its undertaking or trading assets with a view to the cessation of trading;
(4) if the creditor takes possession of assets of the company subject to the security through seizure under power or licence;
(5) if the creditor has a receiver appointed over assets of the company subject to the security;
(6) if the creditor obtains or exercises some other remedy with a view to protection or enforcement of the security.

But before we go into the issue whether what had been done by the scrip banks constituted crystallization, I think I ought to dwell a little on a point which appears to have been raised by Mr Woo and I hope I have not misunderstood him. The point is: can a floating charge, which is unregistered under s 131(1), be converted on crystallization into a valid fixed charge, even if the crystallization occurred before liquidation? I have been asked to bear in mind the objective of s 131(1) of the Companies Act.

In *Re Jackson & Bassford Ltd*,[16] Buckley J, in dealing with the then equivalent English provision (s 14 of the Companies Act 1900), said at p 476 that the object of the provision was:

> ... that those who are minded to deal with limited companies shall be able by searching a certain register, to find whether the company has encumbered its property or not.

Obviously the register maintained under s 131(1) would show 'what moneys are owing by the company on certain securities, so that creditors may have some notion of how far the property of the company is unencumbered': see *Esberger & Son Ltd* v *Capital & Counties Bank*[17] at p 374.

The mischief which this section seeks to remedy was succinctly explained by Cozen-Hardy MR in *Re Yolland, Husson & Birkett Ltd*[18] at p 156 in these terms:

> It was that companies were allowed to issue debentures, charging very frequently all their present and future assets,

> and there might be present and future assets, and there might be no means of ascertaining, at all events for a considerable time, whether any debentures were issued; and therefore, for the protection of the general creditors of the company, or of persons desiring to trade with the company, it was thought fit to require that there should be a register of mortgages of that particular kind, not merely in the company's own books, but by the registrar.

It seems that the abuse which this particular provision had in mind when it was first introduced in the United Kingdom in 1900 was the case where the original promoter and shareholder of a private business might take a charge over all the company's assets in his own favour which would confer priority on him in winding-up against creditors generally of the company who would not know of the existence of the charge.

That being the object of s 131(1), Mr Woo argued that if an unregistered floating charge could still be crystallized into a valid fixed charge, it would render quite meaningless or superfluous s 137 which gives the court the power, on an application of the company or any person interested, to order that the time for registration of a charge be extended. The prescribed period within which a charge must be registered is 30 days. Under that section, before the court exercises its power, it must be satisfied that the omission to register within the time required was 'accidental or due to inadvertence or to some other sufficient cause or is not of a nature to prejudice the position of creditors or shareholders or that on other grounds it is just and equitable to grant relief'.

But I must stress that under s 131, an unregistered floating charge is not void in any case but only void against 'the liquidator and any creditor of the company'. In *Re Ehrmann Brothers Ltd*[19] it was held that 'any creditor of the company' does not mean just any creditor, but only a creditor who has acquired a proprietary right to or an interest in the subject matter of the unregistered charge. It seems to me that the grantee of a floating charge does not have a proprietary right to or an interest in the property subject to the charge as his rights do not attach to any specific property but only hover over the class of property subject to the charge. The company is still free to deal with the property in the course of its business. In the circumstances of our present case I think the relevant question is not whether there could be crystallization of an unregistered floating charge before liquidation but whether, even if there was crystallization before liquidation, that takes the case out of s 131(1). That seems to me to involve a consideration of the question whether the floating charge had thereby been spent, a subject which I will deal with shortly.

I will now consider the issue whether what had been done by the scrip banks constituted crystallization. It must be borne in mind that the floating charge which I hold all the defendants as having had pursuant to the security instruments is over all the stocks and shares of City and not just confined to those listed out in the last daily certificate issued to each bank, which in any case are not identifiable. Accordingly, in order to convert the floating charge into a fixed charge, the chargee must terminate City's licence to trade as to the whole of the company's assets which were affected by the charge: see *R* v *Consolidated Churchill Copper Corp Ltd.*[20] In any event, a notice to seize a particular asset of the company may not be good enough: *Evans* v *Rival Granite Quarries Ltd*[7] at p 1002 per Buckley LJ. But service of notice under an appropriately worded clause could constitute intervention and give rise to crystallization: *Re Brightlife Ltd*[21] at p 681 obiter remarks of Hoffmann J. So what effectively the scrip banks had done was to attempt to pounce down on certain shares of City. This they were not entitled to do notwithstanding the express provisions in each letter of hypothecation which seem to permit that. Two points should be made here. First, those express provisions in the letter of hypothecation must be applied with the necessary modifications to bring them into line with the essential nature and characteristics of a floating charge which in the present case I hold to float over all the stocks and shares of City and if they cannot be so modified then they should be ignored and not be given effect to. It is worthy of note that under the letter of hypothecation the stocks and shares charged were not only confined to those registered in the name of City but also extended to those registered in the names of nominees or otherwise and whether they were in the possession of City or otherwise. Second, in view of the fact that the daily certificates did not specify the precise share certificates that were hypothecated, the right to pounce down as elaborated in those provisions has no scope to operate, as there is a problem of identification. Accordingly, there being a floating charge over all the stocks and shares, the scrip banks cannot pounce down on particular assets: per Fletcher Moulton LJ in *Evans*[7] at pp 997-998. Crystallization can only take place in relation to all the stocks and shares. The banks must crystallize the security as a whole and any lessor attempt would fail.

Then there is the institution of action by the 17 banks (except the eighteenth defendants), pursuant to which each of them (except the third defendant) obtained an interim order for the delivery of the scrips listed in the last of the daily certificates issued. In my view institution of an action per se does not bring about crystallization: see *Re Hubbard & Co.*[22] More importantly, the action instituted by each scrip bank was not intended to revoke City's right to carry on business but only to recover the scrips listed in the last certificate. For those same reasons given in the immediately preceeding paragraph, I would hold that neither the action nor the interim order brought about any crystallization. But that is not all.

I would at this juncture refer to the terms of the interim order to show that the banks must have realized

the difficulties they faced in arguing for a fixed charge. As an example, I will cite the order of court given in favour of the first defendant. Paragraph 1 of the order, which was obtained ex parte, required City 'to deliver up to the plaintiffs the securities particularized in the last furnished daily certificate *and such other daily certificate or daily certificates which may be furnished* to the [bank] from time to time together with duly executed relevant transfer documents ...' (emphasis added). By para 2 of the order, City was restrained from disposing of to others or dealing with the shares so listed in the daily certificate or certificates. The order also provided that where the bank had indicated the non-acceptability of certain shares listed in the daily certificate, City was required to replace them with acceptable ones. As would be apparent, the bank was clearly unsure on which shares crystallization had occurred and in respect of which it was entitled to ask for delivery. It even envisaged the issue of further daily certificates by City (except the orders obtained by the seventh and eighth defendants). This is hardly the sort of position one would expect to find of a chargee if the security he has obtained is a fixed charge as the scrip banks claimed it to be. In any event, an order of this kind obtained ex parte cannot alter the rights and liabilities of the parties. It only seeks to preserve the assets claimed by each bank without prejudice to the ultimate rights of the parties. It does nothing more. This being the nature of such an interim order, whatever shares delivered by City to the bank in apparent compliance therewith must be held by the bank to await the outcome of the action pending between the parties. Such a delivery cannot bring about crystallization.

Even assuming that I was wrong to think that there was no crystallization of the floating charge on the grant by the court of the interim order and/or on the delivery by City of the share certificates in apparent compliance with the order, the fact remains that on crystallization, no new charge is created. As *RM Goode on Legal Problems of Credit and Security* (2nd Ed) states at p 59:

> Crystallization does not involve re-registration in the Companies Registry, for no new security interest is created. All that happens is that the security interest brought into being by the floating charge ceases to float over a fund of assets and attaches in specie.

The floating charge cannot be considered to have been spent as the share certificates were being held as security for the outstanding loan due from City to the banks. The securities so held by the banks would still be void against the liquidators. In support of this proposition I would rely on *NV Slavenburg's Bank* v *International National Resources Ltd*[6] and *Re J & D Contracting Pty Ltd.*[23] Both these cases will be discussed later.

There are three other points which I need to touch on briefly. It has been suggested that as City delivered the share certificates demanded by the scrip banks, that shows there was no difficulty regarding ascertainment. I do not think such an act of appropriation on the part of City in meeting the requirement of an order of court in any way proves that identification was never a problem. It is obvious that what was done was that City just delivered whatever share certificates it possessed on a particular counter to meet the requirements of the order of court. As Mr Yorke described it, shares are fungibles; especially I would say when the shares in question are not identified by the certificate numbers. The second point relates to the argument based on equitable mortgage. For the same reasons which I hold that the scrip banks have failed to show there is a fixed charge, this argument must also fail. The third point relates to the argument that the actual delivery of the share certificates (with duly completed transfers in blank) by City to the scrip banks constituted a pledge. I do not think it is appropriate to view this act in isolation and separate from the security instruments. Further, the delivery was pursuant to an interim order of court. Such an act cannot and was not intended to create a fresh arrangement between the parties.

(c) Special position of the third and eighteenth defendants:

I now turn to the arguments of Mr Miller. Besides associating himself with the points raised by Mr Cresswell, he has raised some alternative arguments. The first is that in so far as the third and eighteenth defendants are concerned, each daily certificate issued by City constituted a specific charge of the shares in question. I must observe that one consequence of this argument would be that all subsequent conduct of the parties, including the fact of multiple hypothecations, may be taken into account. It follows that the line of cases which I discussed in *Re Lin Securities*[4] and which precluded the taking into account of subsequent conduct in determining the nature of an instrument, can have no application whatsoever.

While this argument is ingenious, I am afraid it must fail. First, I do not think it is appropriate to treat each and every daily certificate as a separate transaction. The certificates were issued pursuant to the letter of hypothecation given to the third defendant and the facility letter issued by the eighteenth defendant and it is highly artificial to divorce the daily certificates from the main instruments. Even Mr Miller had to admit that reference might have to be made to the letter of hypothecation to show the terms under which each daily certificate was governed. In truth, the letter of hypothecation and the daily certificates constituted one comprehensive transaction. Secondly, I do not see how a fixed charge could arise when the daily certificates did not specify the precise share certificates that were charged thereunder. The point on fungibles is just as applicable. Nothing speaks louder than the fact that

when on 19 February 1986 the third defendant sought to inspect the shares listed in the daily certificate of 17 February 1986 and was refused inspection by City, the third defendant was unable to identify which shares were charged to it under the certificate of 17 February 1986. I agree that a company could validly create a fixed charge over assets which have yet to come into being, but there must be no problem as to their ascertainment. I do not wish to repeat the reasons which I discussed in *Re Lin Securities*[4] why ascertainment was not possible in a case such as the present.

The second alternative argument of Mr Miller relates to the arrangement made by the third and eighteenth defendants with City on 21 February 1986 under which the share certificates were placed in safe deposit boxes under the joint names of each of the two banks and City. The boxes could only be opened by the parties jointly. He said that even if this court should hold that the letter of hypothecation and the daily certificates on their true construction constituted a floating charge, then by virtue of this joint safe deposit box arrangement there was crystallization of the floating charge; or there was a pledge. With respect, I disagree. Two observations may be made here. Firstly, as I have ruled above, the letter of hypothecation created a floating charge over all the stocks and shares of City as a class. It is therefore not permissible for the bank to pounce down upon individual share certificates. Such a kind of pouncing down cannot give rise to crystallization. The liberty given to City to trade must be terminated before there could be crystallization. Secondly, the holding of the share certificates in the safe deposit boxes did not give exclusive possession of the same to the banks. Thus there could not be a pledge: eventually Mr Miller conceded that. Neither did they seize the shares. Thus, they cannot rely on *Mercantile Bank of India* v *Chartered Bank of India, Australia & China*,[8] a case which will be discussed later. In my opinion, the share certificates were being held jointly in the safe deposit boxes as a security pursuant to the letter of hypothecation and the facility letter and as the latter are void for non-registration, the share certificates so held must also be void against the liquidators. There was no crystallization and even if there were, there is no question of the letter of hypothecation or the facility letter being spent as the share certificates were at the commencement of liquidation still being held as security for the outstanding debts owing by City to the third and eighteenth defendants. Neither has there been any foreclosure or any sale of the shares before liquidation. In support of this proposition I would rely on *NV Slavenburg Bank* v *International National Resources Ltd*[6] and *Re J & D Contracting Pty Ltd*.[23] The deposit of the share certificates in joint custody was in truth ancillary to the unregistered floating charge and therefore void: *Re Moulton Finance*.[24] I do not think it is possible to view the deposit as separate and distinct from the letter of hypothecation or the facility letter.

I will now briefly discuss the authorities referred in the above paragraph. In *NV Slavenburg's Bank*,[6] one of the issues which the court was asked to determine was the effect of non-compliance with s 95 of the English Companies Act 1948 of a number of charges, where no particulars thereof were ever delivered to the registrar for registration. There a company incorporated in Bermuda, which had an established place of business in England, entered into agreements in 1974 with a Dutch bank, whereby the bank provided the company with credit facilities and the company created charges over its assets in favour of the bank. The charges included an assignment to the bank of the company's entire business including its present and future trading stock. Subsequently, some property of the company was deposited with a storage company in England. In December 1975, the bank decided to withdraw further credit facilities to the company and on 29 December 1975 the company ceased trading. On 9 January 1976, the bank's solicitors, on its behalf, demanded immediate delivery of all the property stored in England. On 12 January 1976, the bank obtained an ex parte order for the detention and preservation of the goods under RSC O 29 r 3. Pursuant to an agreement reached between the bank and the company on 20 January 1976, the property stored in England was sold and the proceeds paid into a joint account in England in the names of the parties' solicitors, on the terms that the rights of each in the proceeds were to be the same as their rights in the property before the sale. On 15 March 1976, a creditor petitioned in Bermuda for the winding-up of the company and on 19 April 1976, such an order was made by a Bermudian court. Liquidators were appointed. For the purposes of those proceedings, the English court was asked to assume that the agreements entered into between the company and the bank in 1974 created charges. Several legal issues were raised by the Bermudian liquidators. One of their contentions was that the charges in respect of the property stored in England were void as against the liquidators under s 95(1) of the 1948 Companies Act. From the way the bank presented its argument it seems to say that the charges were floating charges. The bank submitted that as the property under storage had been sold and the proceeds paid into a joint account before the liquidators were appointed, the charges were spent before that date and as the liquidators were not parties to the joint account agreement of 20 January 1976, they had no claim to the proceeds. To this Lloyd J, having agreed that once a charge was spent there was nothing for s 95 to bite on, answered as follows (at p 968):

> The money is still in the joint account. It is no more within the control of the bank than it is within the control of the company. In the absence of agreement between the parties to this action, the destination of the fund in the joint account is subject to the decision of this court. Secondly, when one looks

at the bank's pleadings, it is clear, as counsel for the defendants point out, that the basis of the bank's claim to be entitled to the amount in the joint account are the very charges which the liquidators seek to impugn. It hardly lies in the bank's mouth to say that the charges are spent, when, at the same time, it asserts their existence and validity as the basis of its claim against the company.

The learned judge then went on to hold that even if the bank could overcome these difficulties, on the true construction of the agreement of 20 January 1976, the charges were not spent when the property was sold and the proceeds paid into the joint account and the rights of the parties were to be considered as if the property had not been sold and was still in existence. It followed that the funds remained subject to the charges and that s 95 applied to the funds. I should, however, observe that though the company ceased business before demand was made by the bank for the delivery of the property, it appears the point was not taken by the bank that that constituted crystallization. Crystallization was not expressly mentioned in the judgment and it seems to me that what was more relevant to Lloyd J was not whether the charge had crystallized but whether it had been spent. In my view, the case established that delivery of property made pursuant to an order of court or by consent prior to liquidation did not perfect a floating charge and take it out of s 95.

In *Re J & D Contracting Pty Ltd*,[23] a company executed a chattel agreement in the form of a bill of sale on a tractor in favour of the respondent for the purpose of securing payment of money due from the company to the respondent. Following default on the part of the company and in exercise of its rights under the chattel agreement, the respondent seized the tractor on 11 January 1968 and sold it on 18 March 1968. In the meantime on 19 February 1968, a resolution was passed for the winding up of the company and the applicants were appointed liquidators. The question that arose was whether the sale of the tractor effected by the respondent was to be treated as void in the winding up of the company. The Supreme Court of Queensland held that though the respondent had seized the tractor, the company had always the right, on payment of the moneys due, to redeem the property. This right of redemption endured until 'either by foreclosure of the property mortgaged or by sale of that property'. The court went on to hold that the sale was part of the process of realizing the security and as the charge had not been registered as required by s 100 of their Companies Act it was void against the liquidators. It will be noted that the tractor was seized by the respondent before the resolution for winding up was passed. Lucas J explained at p 103:

> In my opinion, therefore, the sale by the respondent of the property was invalid since the respondent's power of sale, being a power conferred as part of the security constituted by the document, had been destroyed, so far as the liquidators were concerned, by the failure to register and the passing subsequently of the resolution for winding up the company.

I am conscious that this case involved a bill of sale and no question of crystallization arose. But the decision is significant because even though the chattel was seized before the winding-up resolution was passed, it could not escape the effect of s 100 of the Companies Act and the party who seized the chattel was not entitled to the benefit of that security.

In *Re Molton Finance Ltd*,[24] a decision of the Court of Appeal, a firm of stockbrokers lent £15,000 to a company and as security the company gave to the stockbrokers subcharges on properties and deposited deeds and documents with them 'to the intent that the same may be equitably charged with the repayment' of the £15,000. The charges were not registered under the Companies Act 1948. The company went into liquidation. Realizing that the charges would be void for non-registration, the stockbrokers contended that by virtue of the deposit of the deeds and documents they had a valid common law lien on the deeds and documents. The first instance judge dismissed the contention and so did the Court of Appeal. Lord Denning MR explained (at pp 332-333):

> It seems to me that when an equitable mortgage or charge is created by deposit of title deeds, there is an implied contract that the mortgagee or chargee may retain the deeds until he is paid. This implied contract is part and parcel of the equitable mortgage or charge. It is not a separate legal or common law lien. It has no independent existence apart from the equitable mortgage or charge. When the mortgage or charge is avoided for non-registration, then everything which is ancillary to it is avoided also. So this contractual right of retention is avoided too. It seems to me quite impossible to suppose that a separate lien is preserved after the charge has been avoided.

In the same way, if the letter of hypothecation is a floating charge, as I now hold it to be, and it is void for non-registration, then all security interests that flow therefrom must also be void. Of course the debt remains and it is an unsecured debt.

In *Mercantile Bank of India* v *Chartered Bank of India, Australia & China*,[8] two banks had lent money to a company under letters of hypothecation and letters of lien. The company subsequently went into liquidation. Each bank alleged against the other that the other's securities were void for non-registration. Prior to the liquidation, Chartered Bank had seized the company's assets under the terms of its security which security the court did not find it necessary to decide whether it constituted a floating charge or fixed charge. However, the charge was not registered under the Companies Act. The learned judge, after referring to *Re Toomer, ex p Blaiberg*[25] and *Wrightson* v *McArthur & Hutchinsons*[2] said:

> On the authority of those cases, it appears that once seizure had taken place, at a time before liquidation, at any rate, of the

company, the security, even if it were originally a floating security, has ceased to be so describable. It has become a definite charge which has been perfected by the seizure of the goods. Therefore, in so far as the Chartered Bank has seized the goods rightfully, it is entitled, in my view, to the benefit of its security.

I would make a few observations on *Mercantile Bank of India* v *Chartered Bank of India, Australia & China*.[8] First, there was a complete and rightful seizure made in accordance with the relevant security instrument before winding-up and the court seems to have held that if the charge had originally been a floating charge it had been perfected into a fixed charge. Secondly, in *Chartered Bank*,[8] it was conceded that by the act of seizure the seizing bank was put in a better position and perfected its charge. The point was not really argued. Further, the fact that the assets seized were not sold was not raised as an issue before the court. Thirdly, the decision could perhaps be justified on the ground that on the facts and in the light of the provisions of that case, the creditor no longer needed to rely on the charge because once he had received satisfaction of his debt through enforcement of his security against the property, the subject matter of the charge, that property ceased to be the property of the company. The charge was no longer in effect. The facts of the present case, however, nowhere reached that point. The share certificates delivered to the scrip banks were pursuant to the orders of court to preserve the rights of the parties. In so far as the third and eighteenth defendants were concerned, the joint safe deposit box arrangement cannot by any stretch of the imagination be construed to amount to a seizure. Fourthly, Mr Yorke (and Mr Woo too) submitted to me that *Chartered Bank*[8] was wrongly decided. He argued that the two cases, *Re Toomer*[25] and *Wrightson* v *McArthur & Hutchinsons*,[2] were no authority for the proposition that Porter J sought to lay down. *Re Toomer*[25] involved an interpretation of s 8 of the Bill of Sales Act 1878. It was not concerned with the question of perfecting a floating charge or the effect of non-registration of a security instrument. Similarly, *Wrightson*[2] had nothing to do with a floating charge. However, since the facts of our present case are so different from that in *Chartered Bank*,[8] there is no necessity for me to rule whether *Chartered Bank*[8] is good law. It is clearly distinguishable. But I would say this. It has not been overruled in any later case though in *Re J & D Contracting Pty Ltd*[23] the court said the decision in *Chartered Bank*[8] should be confined to its facts. In *NV Slavenburg's Bank*,[6] the court again merely distinguished *Chartered Bank*,[8] without any express word of disapproval.

There is just one other authority which I ought to refer to before I conclude this issue. It is *Re Row Dal Constructions Pty Ltd*,[26] a decision of the Supreme Court of Victoria. In that case, there was an equitable assignment of book debts by a company to a bank as security for a loan extended by the bank to the company. The assignment was not registered. The company subsequently went into liquidation but before it went into liquidation the bank had been paid the amount of its loan under the assignment. The liquidator sought to recover from the bank the amount paid under the assignment on the ground that the assignment was void as against him for non-registration. The court held that the liquidator could not succeed because the bank had already been paid before he came on the scene. Herring CJ observed (at p 258) that when the liquidator was appointed 'there was no property of the company upon which the bank claimed any security'.

There is really no basis for comparing the situation in *Re Row Dal Constructions*[26] with the situation in our present case. Gough says at p 333 that:

> ... the liquidator would be able to use the avoidance provision against an unregistered secured creditor so long as the security property remains in the ownership of the company (or at least so long as it retains equity of redemption therein) and so long as the creditor can claim any right thereto only under and by virtue of his charge.

On the facts of our present case that is precisely the position.

There remains two ancillary points raised by Mr Miller. The first relates to a master list which it was alleged City kept. This was referred to in the call reports exhibited in the affidavit of the third defendant. Other than such a vague reference, nothing is known as to what was entered in such a master list. There is no evidence at all that the master list, if it existed, identified the shares charged to each bank by certificate numbers. The bank officers did not see any master list. Of course, this master list is completely extraneous to the letters of hypothecation or the daily certificates. The second point is that under the facility letter, City was required to set aside the shares which were charged to the third defendant so there could be no problem regarding ascertainment. Even assuming it is proper to incorporate this requirement of the facility letter into the letters of hypothecation, that would not make it a fixed charge as City still had the liberty to trade. So was the joint safe deposit box arrangement. I may mention that a similar point, also involving the third defendant, Tat Lee Bank, was raised in *Re Lin Securities*.[4]

(d) Special situation of the fourth defendant:

I shall now turn to the arguments made by Mr Lightman on behalf of the fourth defendant. Though the letter of hypothecation executed in favour of the fourth defendant only contemplated periodic notices being issued, Mr Lightman has not placed any emphasis on this difference. In my view, there is really no material difference between this letter of hypothecation and the others. Some of his arguments (ie letter of hypothecation with daily certificates constituted fixed charge; delivery of securities by

City to the fourth defendant constituted crystallization or perfecting of charge) have already been discussed above and I do not propose to repeat them. I will confine my comments to the one argument which is peculiar to the position of the fourth defendant. This relates to the trunk arrangement which was brought about on 23 January 1986 because the fourth defendant wanted stricter control over the shares which were charged to the bank under the letter of hypothecation. The keys to the trunk were held solely by the bank. Under this arrangement, the share certificates in accordance with the daily certificate furnished were locked up in the trunk in the evening. The trunk was opened the next morning for City to trade. And so it went on day after day. The share certificates that were locked up in the trunk would presumably be different from day to day in accordance with the shares listed out in the daily certificates.

My first observation regarding this arrangement is that one cannot view it in isolation. It was made pursuant to the letter of hypothecation and was as much a part of it as the daily certificate itself. And since I rule that the letter of hypothecation only created a floating charge and as the letter of hypothecation was not registered, it is void and all arrangements made pursuant thereunder must also be void.

Assuming I am wrong on this and that it is possible to view the trunk arrangement as separate from the letter of hypothecation, then all subsequent conduct and circumstances are relevant and may be taken into account. It cannot be disputed that during the period from the locking of the trunk in the evening up to the opening of the trunk the next morning, the bank did have the share certificates that lies therein in its possession (see *Wrightson v McArthur & Hutchisons Ltd*[2]). But it is also clear that from the moment the trunk was opened in the morning of the next day up to the close of business for that day, the bank would have nothing in its possession as security because the trunk would have been opened to allow City to trade. It must have been within the contemplation of the parties that City would trade in those shares, otherwise why open the trunk in the morning just before trading began. There were no serial numbers to indicate which were the share certificates in the trunk before the trunk was opened in the morning. A bank which was serious in wanting to hold on to its security, particularly having been aware of the letters of hypothecation created by City in favour of other banks, would obviously have insisted on simultaneous substitution of that lot of share certificates with another lot of equivalent value, before the first lot was allowed to be taken away. That would have created a fixed charge or more accurately an equitable mortgage. But that was not the case. One would then also have expected the bank to record the serial numbers of the share certificates which were kept in the trunk. This was again not done. Having considered the arrangement as a whole, notwithstanding the adoption of the daily ritual of opening and closing the trunk, I am of the opinion that the arrangement in truth created, if at all, no more than a floating charge. There could not be a fixed charge. Again, nothing illustrates this point more clearly than the fact that when the bank was refused access on the evening of 19 February 1986 to check the trunk and inspect the contents therein, the bank was in no position to identify the share certificates upon which the alleged fixed charge attached. This was conceded by Mr Lightman. When asked specifically by Mr Sarjit Singh which share certificates the fourth defendant would rely to claim a fixed charge, Mr Lightman said the fourth defendant relies primarily on the certificate of 17 February 1986 or alternatively that of 21 February 1986. I should mention that the interim order which this bank obtained against City on 21 February 1986 required City to deliver up the securities listed in the daily certificate dated 17 February 1986 '*and such other daily certificate or daily certificates* which may be furnished to (the bank) from time to time ...'. The other provisions of the order are no different from the order obtained by the first defendant which I have described hereinbefore. Mr Lightman also conceded that there is no evidence whether the share certificates (with duly executed blank transfers) delivered up by City to the fourth defendant were in fact the share certificates located in the trunk on the night of 18 February 1986 and listed in the daily certificate of 17 February 1986.

In any event, I would repeat that one really cannot separate the trunk arrangement from the letter of hypothecation, from which everything else flowed.

There remain just two minor points. City was required under the letter of hypothecation to set aside the share certificates and blank transfers hypothecated to the fourth defendant: a point similar to that of the third defendant. The answer would have to be the same. Considering that City had the liberty to trade by substituting the shares in one daily certificate with others in the next certificate, the setting aside of share certificates intended to be charged to the fourth defendant could not have altered the basic nature of the letter of hypothecation which was a floating charge. The other point is whether the delivery of the share certificates to the fourth defendant pursuant to the order of court would constitute a pledge or a lien. Here again, I think it is highly artificial to separate the act of delivery from the letter of hypothecation from which everything flowed. The delivery was obtained pursuant to an unregistered floating charge. As the charge is void for non-registration, then any security obtained ancillary thereto must also be void: see *Re Molton Finance*.[24]

Conclusion

In my judgment, on a true construction, each of the security instruments created no more than a floating

charge. This is notwithstanding that some of the express provisions therein may appear to indicate to the contrary. Undoubtedly the actions taken by all the defendant banks were as if they were enforcing a fixed charge. Yet they were unable to identify the specific share certificates upon which the fixed charge attached. And for all the reasons given hereinbefore, they have not brought about crystallization. The security instruments are therefore void against the liquidators.

I am satisfied that the result which I have reached in this case is in consonance with the intentions of the banks concerned, ie to be treated pari passu. I do not think it is fair and equitable that just because the scrip banks have stolen a march over the other banks in the sense that they have acted a little more speedily than the rest, following rumours of difficulties encountered by City as a consequence of the debacle involving the Pan Electric Company, a public listed company, in late 1985/early 1986, that that should alter the essential nature of the arrangement. It is also inequitable that just because City succumbed to the demands of the scrip banks to deliver share certificates to them, that they should have an edge over the other banks. It seems to me clear that when the going was good all the banks were keen to extend facilities to City; after all it must have been a good business proposition. They did not appear to be quite so concerned about the nature of their security. I say this because while every effort was made to incorporate as many of the provisions as possible relating to a fixed charge into the letter of hypothecation, they had deliberately left vague or flexible the assets charged by not requiring that the serial numbers be specified in the daily certificates and also by giving City the liberty to substitute shares listed in each daily certificates which in turn meant that City was given a licence to trade in those shares. These two crucial aspects clearly negate any question of a fixed charge. Each bank entered into the credit arrangement knowing full well that City had similar arrangements with other banks. And of course the banks knew that the charge should have been registered with the Registry of Companies. Yet they were rather nonchalant about it so long as there was parity of treatment among the banks. I am convinced that this court would have caused grave injustice among the banks if it had held that the letters of hypothecation (or the facility letter, in the case of the eighteenth defendant) or any of the subsequent arrangements/actions created a fixed charge.

There is a procedural point which arose during the hearing which I ought to refer to. This relates to six bundles of documents which were prepared by the liquidators and identified as white bundles A, B, C, D, E1 and E2. At the commencement of the hearing before me, these bundles as such were not exhibited in any affidavit of the plaintiffs or the defendants though some of the documents therein have already been exhibited in the affidavits of the parties. These bundles were referred to by Mr Cresswell in his submissions. However, Mr Miller and Mr Lightman objected to the use of these bundles. Mr CR Rajah, who appeared with Mr Yorke, told this court that the white bundles were prepared on 26 June 1989 and were sent to all the parties. The intention behind the preparation of these bundles was to produce completely to the court all relevant documents. No objection was raised by any party to the use of those bundles at a meeting of the parties held on 6 July 1989. However, in order to avoid a protracted argument on a technical point, the liquidators filed an affidavit on 14 July 1989 formally exhibiting those bundles. I do not think any party has been prejudiced by the late formal introduction of the white bundles, though Mr Lightman said that he had prepared the case based on issues raised in the affidavits. It has not been alleged that any of the documents in those bundles are not true copies. I have given more than ample time to each party to deal with the points raised by the other parties. Though Mr Yorke did inform the court that he himself would not be relying on anything in the white bundles, other counsel have referred to them. It seems to me that to rule out the white bundles of documents in these circumstances would not be justified.

In this judgment I have not expressly dealt with all the arguments raised by the parties. But this does not mean that I have not considered them. Many of those arguments are of a peripheral or consequential nature. However, having regard to the approach I have adopted in dealing with the issues before me, I do not think it is necessary for me to set them all out, as that would only detract from the main points.

Order accordingly.

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Reported by *Terence Tan Bian Chye*